

## Should We Kill the Goose That Laid the Golden Egg?

### Do We Need a Functional Definition of Charity in the United States?

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#### Introduction

My introduction to the fields of charity and philanthropy, which I have been studying for nearly forty years now, came about rather curiously. I had been asked by Humphrey Doermann, who was about to become president of the brand-new Bush Foundation in St. Paul, about the historical origins of philanthropic foundations. My immediate response was that I didn't know anything. He asked me if I would do a little quick research and come up with a list of books he could read so he would be properly informed on the history of philanthropy.

I called him a week later and told him that, so far as I could tell, there really wasn't anything much on the subject in the library. Humphrey's response was to challenge me and my colleague Barry Karl to write a book on the history of the philanthropic foundation. And he promised us Bush funding to do it. It turned out, however, that his new board didn't think this was a good idea at all. So Barry and I were on our own, but we were hooked on the idea.

Neither Barry nor I had ever applied for a foundation grant before, but we decided to give it a whirl, and wrote grant applications to thirteen of the largest foundations in the United States. This turned out to be Lesson One: we got exactly the same letter from every foundation saying that "This is a really fine idea, but it's out of program for the X Foundation." We had no idea what "out of program" meant, but could see that we had struck out and gave up on the project.

A few months later I was sitting in my office at the University of Chicago Law School early one morning, when the phone rang. The operator informed me Mr. Bundy was on the line. I was surprised, but I assumed it might be McGeorge Bundy, whom I had

known slightly from my days at Harvard. “Hello, Stan, he said, it’s Mac. I’m calling you about that grant proposal you sent us.” I am pretty sure that my immediate response was “Fuck you, Mac.” “Hold on,” Stan, he said, “I really do want to talk to you about it! “It’s a great idea!” “But you just told us it’s out of program, whatever that means.” “No,” Mac replied, “It *is* out of program, but it’s a great idea, and I can make you a President’s Grant that doesn’t require any formal process here and it can be out of program. In fact, if I make you a President’s Grant, most of the other large foundations will give you some funding, too.” That proved to be exactly what happened.

There is one amusing follow-up. Bundy then asked the Secretary of the Foundation, Howard Dressner, to call me to find out how much money we would need to get going with our research. So Barry and I discussed what our ask should be. We thought we should try not to request too much. Mac had mentioned that the maximum for a President’s Grant was \$35,000. And so when Dressner called me, I said, “Well, we’ve looked at the budget and we absolutely cannot do this for less than \$17,500.” That produced a long period of silence from the other end of the phone. Then Dressner responded: “Mr. Katz, you don’t understand.” “What don’t I understand?” “You don’t understand that this foundation cannot give *less* than \$35,000 for such a grant!” This was my introduction to philanthropic grant-making, and my first sense of what the larger problems might be.

I want to make two points about the legal definition of charity from the perspective of a historian of philanthropy: the *first* is that in this country the institution of the philanthropic foundation came into existence without any explicit public policy determination of what it was or what it could and should do; the *second* is since there never has been any functional definition of the status of philanthropy as an institution, philanthropy has been and will continue to be strongly resistant to functional “reform.” It is very hard to reform something you cannot even describe adequately. That is to say that philanthropy is a moving target for reformers, since it keeps subtly changing in form and public perception. As I hope will come clear later, the amorphous character of philanthropy as an institution has the advantage of permitting (or possibly encouraging) innovation. But the definitional flexibility of philanthropy simultaneously makes the institution exceedingly difficult to

discuss critically or to shape through regulation.

### 1. What Was “Philanthropy” in the Twentieth Century? How Was It Different From “Charity”?

In the beginning came a new idea, philanthropy. The word “philanthropy” had been used in many different ways earlier in England and American history, but here I want to use the term in the way that Andrew Carnegie and John D. Rockefeller, Sr. used it in their own writing and acts at the very beginning of the twentieth century. Rockefeller and Carnegie distinguished sharply between “charity” and “philanthropy” (about which Ben Soskis has been writing so persuasively). They thought of charity as the giving of alms, as the mechanism for the redress of individual situations of distress begotten of illness, poverty or ignorance. Both Carnegie and Rockefeller practiced charity throughout their working lives. Each had long employed a room full of clerks who answered letters and sent checks to people who beseeched them for handouts. They were thus conventionally charitable. But both Carnegie and Rockefeller came later in their lives to realize that there was something more important than charity, and they generally called this notion “philanthropy.”

Philanthropy, conceived of in this very modern way, was the search for the underlying causes of the immediate problems that charity was trying to address. Philanthropy sought to eradicate illness, poverty, and social distress. Philanthropy sought to go to the root causes of these fundamental problems of society in order to enable us to completely eliminate these problems. Philanthropy sought national or international public policy change as its ultimate *modus operandi*. The philanthropist, so conceived, would invest his funds in a very different sort of way than the almsgiver.

It is significant that early philanthropists made their great fortunes in a different manner and context than their counterparts today. For one thing, they lived in a pre-federal income tax context. Taxation and exemption from taxation were not significant concerns for them. The Rockefellers were initially worried about the potential state tax implications of their proposed philanthropic foundation, but their lawyer, Starr Murphy,

advised them the rates of state income taxation, the only existing form of income taxation, were so low (around 1) that it really didn't make any difference in what state the family incorporated its foundation. It truly can be said that, ten or twelve years before the Sixteenth Amendment, tax liability was not on their minds.

Rockefeller and Carnegie made their fortunes through the vertical integration of extractive industries. They were geniuses at what was then modern business organization. They were also able to tap into exciting new scientific knowledge, since they were living during the peak of the second scientific revolution. They also lived at the time during which the research university was established in America, and served as a remarkable mechanism for the production of new knowledge. These pioneering philanthropists brought all these developments together. They identified university research as the basic vehicle for philanthropic investment, since they believed that this was only through such inquiry that we could understand both what the most important social problems were and how we might address them. This was, they thought, scientific, modern, philanthropy. These developments stimulated the establishment of the learned foundation, the institution whose primary function was the funding of the useful, new knowledge upon which human progress would be made.

The early philanthropists needed an institutional vehicle in order to apply their funds efficiently to the rational analysis of a vast array of human problems, but no such organizational form existed at the time. Their consequent creation of what we now call the "private philanthropic foundation" was one of the great institutional innovations in American history. I think most of us assume that the foundation was somehow an old English charitable institution. Not so. There were of course charitable "foundations" of a variety of types in England and the United States, but the (endowed) grant-making foundation simply did not exist in 1880. Neither the organizational form nor its legal rationale existed until after the turn of the twentieth century. The reason for this was that the conception of the modern foundation violated several important precepts of both British and American trust law. What these super-affluent donors sought was (usually) a perpetuity constituted for an indefinite purpose and for an indefinite class of beneficiaries. But

American law in the late 19<sup>th</sup> century restricted the class of perpetuities to those with definite purposes and beneficiaries. How this puzzle was solved is, I hope, well described in a law review article that Barry Sullivan, Paul Beach and I published in 1985.<sup>i</sup>

But what is important for my present argument is that the early philanthropists managed to create a perpetuity that was organized so that its legal purpose could be as broad as activities intended “for the well-being of mankind” – nearly anything could be done by a foundation and nearly anyone could benefit from its activities. If the foundation was well-managed by its (self-perpetuating) trustees, then, even long after the death of the donor, redefinition (or specification) of philanthropic purpose would avoid the “dead hand” problems that had afflicted earlier kinds of perpetuities. The trustees’ job was to adjust the current activities of the foundation to the current needs of the society. They were also charged with hiring a distinguished individual, usually a retired university president, to be the chief executive. Then they hired a bunch of smart, white young Protestant men from the elite Eastern colleges to carry out the grant-making programs authorized by the trustees and administered by the president. The idea of a “program” was their way of institutionalizing the purposes of the donor as understood by the trustees of the foundation – and soon the notion that some activities were “out of program” became a logical necessity. *Voila*, the philanthropic foundation was born in the second decade of the twentieth century! It was a brilliant institutional innovation, one which is essentially unchanged today from an organizational/ sociological point of view.

The extent to which the philanthropic foundation form proliferated in the United States is astounding. But what is most interesting is that Americans have avoided the English approach to defining and organizing charity, which was to insist upon a precise and explicit understanding of what constituted charity. The 1601 Elizabethan Statue of Charities is still the fundamental basis of the law of charities in the United Kingdom. This statute, which has of course been altered somewhat over the years, establishes a highly specific and prescriptive definition of charity. Its famous preamble was a rag-tag list of traditional charitable practices, from “the relief of the aged, impotent and poor people” to “aid or ease of any poor inhabitants concerning payments of fifteens.” British judges over the

years have accepted that there are “other purposes beneficial to the community, not falling under any of the [traditional categories],” but the concept of charity was understood to be bounded.<sup>ii</sup> In the recent past, the British have also created an independent agency, now the Charity Commission, which supervises and regulates the charitable system. This is the way in which legal institutions affecting the public interest are established and maintained in most parts of the world, and we Americans could have gone that route. But we did not. In effect we permitted private legal action to create a public institution (the private philanthropic foundation), which we have only subsequently defined and regulated – and through the federal income tax system rather than a specialized independent agency. The result, as I will try to show, is that it has been very difficult in the United States to specify precisely what a philanthropist can or cannot do. It is hard to say whether the vagueness of the definition is deliberate or inadvertent, though it may be both. While this is thought by some to be the genius of our system, I want to argue that our approach has some significant functional problems.

After the Sixteenth Amendment was ratified in February, 1913, we Americans consigned charitable giving to the federal tax code and adopted many of the key legal conceptions of state charity law, including the notion of tax exemption. In consequence, charitable organizations are now categorized by federal law as “tax exempt” – we thus define charities by what they are not, rather than what they are. The result is that we do not have a formal substantive definition of charity/philanthropy. The law tells people what they cannot do (self-dealing, surplus distributing) rather than what they can do. Over time, the default has dominated; philanthropists are assumed to be doing the permissible, unless it is quite clear that their philanthropy is impermissible. It is not entirely unfair to say that our legal policy position is that it should be legal to make a charitable gift for any purpose that is not contrary to explicit legal rules. In practice, this means that the philanthropist can give for any purpose that is neither criminal nor clearly violates some section of the Internal Revenue Code. The default is that most genuinely non-self-aggrandizing gifts are charitable. Marion Fremont-Smith concludes her most recent book by saying the “rationale for the existing system” of American charity law is “to afford freedom to chari-

table fiduciaries to manage while assuring the public that charitable funds will not be diverted for private gain or used recklessly.”<sup>iii</sup> No other country that I am aware of permits such wide philanthropic discretion.

I used to be a historian of the British Empire. Like the British Empire, our philanthropic “system,” which is not truly a system, was created in a fit of absence of mind. We didn't start out by conceptualizing a philanthropic sector, and for a variety of mostly political reasons we have not really tried to conceptualize the sector in subsequent years. We now have a great many rules constraining charitable behavior as a result of occasional “reforms” of the tax-exempt system, but I do not think that they constitute either a comprehensive legal framework or a comprehensible policy to guide the administration of this continuously emergent sector. Indeed, until about thirty years ago, we never thought of it as a sector. What has happened is that a great many legally permitted individual acts of philanthropic institutional generosity have cumulated into an informal system that has little in the way of coherent rationale or structural oversight to constrain it.

The unarticulated assumption has been that the law of charities should support the benevolently public-serving purposes of private wealth. Philanthropy is “private power for the public good,” as Ellen Lagemann has said.<sup>iv</sup> The further (unspoken) assumption is the state does well not to inquire too closely into how wealthy individuals choose to serve the public with their wealth. That’s the unarticulated rationale for our system, or so many Americans, especially wealthy Americans, think. A further hidden assumption – perhaps the reason why we have done so little to tamper with this so-called system– is that we worry that philanthropy may be the goose that laid the golden egg, and that by closely inspecting the egg we may in fact kill the goose. If we question philanthropy, we may weaken it, and perhaps it will disappear altogether. Warren Buffet, upon being asked critically about his notions of philanthropy, has responded several times, “Well what would you like me to do with my wealth, leave it to my children?” Buffet knows, and we know, that most Americans prefer that he dedicate his wealth (or, more honestly, power) to public purposes.

The historical irony in the assumption that philanthropy is self-evidently a good thing is that we have forgotten how controversial the institution of philanthropy was a

century ago, during the decade in which the philanthropic foundation emerged, when the foundation provoked more serious political disagreement and dissent than in any subsequent period of our history. Many prominent Americans totally rejected the notion of philanthropy and its institutional embodiment, the philanthropic foundation, as proposed by the likes of Rockefeller and Carnegie.

This reaction against philanthropy was most dramatically expressed in the federal Walsh Commission on Industrial Relations which held hearings between 1912 and 1915, and published its report in 1916. Frank Walsh, a socialist lawyer from Kansas City, Missouri, chaired these hearings, which were essentially an attack on the Rockefeller family, Standard Oil, and the then-new Rockefeller Foundation. In the thousands of pages that make up the report, many prominent Americans (including Henry Ford) spoke in opposition to both the Rockefeller Foundation and the foundation as an institution. But the only witness I knew personally was my wife's grandfather. John Haynes Holmes, one of the most wonderful people I have known. He was the minister of the Community Church in New York, a very progressive and formerly Unitarian institution. He was a pacifist and a socialist who spent some time in jail during both world wars for his views, and was jailed even before that during the 1913 Patterson Silk Workers Strike. He was the man who later introduced Gandhi in the United States.

Grandpa Holmes testified: "I take it for granted that the men who are now directing these foundations are men of wisdom, men of insight, of vision, and are also animated by the best motives... My standpoint is the whole thought of democracy. From this standpoint it seems to me that this foundation, in its very character, must be repugnant to the whole idea of democratic society." Holmes goes on to attack the form of the philanthropic foundation: "The administration of such money in the hands of a small board of men ... which is self-perpetuating [is troubling]. In other words, we have here in the midst of a society supposed to be democratic that which is essentially an autocratic system of administration, of an institution that represents power, which is of course simply stupendous ... the whole essence of our democratic society is that it can do its own business, that it does not depend upon outside influences of any kind." v

What is important here is that Holmes expressed a characteristically progressive fear that the philanthropic foundation was simply a device through which enormously wealthy individuals would influence public policy and take away the capacity of the people of the democracy to be self-determining. Many progressives saw the foundation as necessarily the enemy of democracy, a reaction that has disappeared from public discourse on philanthropy until our own era of the mega-foundation. The Walsh Commission report was quite clear about the nature of the threat:

As regards the “foundations” created for unlimited general purposes and endowed with enormous resources, their ultimate possibilities are so grave a menace, not only as regards their own activities and influence, but also the benumbing effect which they have on private citizens and public bodies, that if they could be clearly differentiated from other forms of voluntary altruistic effort it would be desirable to recommend their abolition. It is not possible, however, at this time to devise any clear-cut definition upon which they can be differentiated.<sup>vi</sup>

No legislative reform followed the Walsh Commission, in part because the Commission itself could not see a way to define “bad philanthropy.” The Commission, that is to say, implicitly recognized the “golden egg” problem.

## **2. What is Philanthropy Becoming in the Twenty-first Century?**

The public policy environment for philanthropy really has not changed very significantly over the past century, although a number of what I would call minor reforms have taken place. As I have said, the Walsh Commission hearings themselves did not lead to legislation. Half a century later there followed a series of congressional investigations of foundations: the Cox Committee in 1952, the Reese Committee in ‘53, Cong. Wright Patman’s hearings from 1961 to 1967. Cox and Reese were essentially anti-communist witch hunts, and Patman was a pro-small business populist politician. However, none of these hearings led to meaningful legislation regulating the conduct of philanthropic foundations. The most significant moment of foundation reform in the last century came with the adoption of the Tax Reform Act of 1969. This legislation addressed self-dealing – the capacity of donors to benefit themselves or their businesses, a phenomenon that had become a serious abuse of the foundation form. The Act introduced several important constraints on foundation action, such as distinguishing private from public charities, and changes in payout

requirements, but in truth (and despite the outraged reactions of many in the philanthropic community) relatively little of it constrained the traditional structure or function of the foundation. There have been subsequent legislative changes that are important for foundation management, but they strike me as more housekeeping measures than institutional reforms. So what we have today is a philanthropic sector that looks structurally pretty much the same as it has for a century.

The philanthropic foundation came into existence as a formal institution very quickly – it was fully formed structurally by the mid-1920s. But if philanthropic structures have changed very little, philanthropic strategies and scale have changed significantly. Consider the Rockefeller Foundation. It is one of our very oldest foundations and it remains quite traditional in the formal structure of its organization, but for several decades its managers have struggled without great success to reinvent its performance. There have been a few significant organizational changes, such as the reduction of their commitment to medicine, but basically what has changed in recent years is the foundation’s performance style. The Rockefeller Foundation now behaves in a very different way than it did as a traditional “learned” foundation. Among the larger, older foundations it is the one that has most obviously turned in recent years in the direction of strategic philanthropy (which has replaced the older notion of scientific philanthropy that informed the policies of learned foundations). It has recently been strongly influenced by the concepts of venture philanthropy and impact investing. Thus the Rockefeller Foundation now seeks short term impact, emphasizes measurement and partnerships, and attempts to bring together the non-profit and the for-profit sectors. I accept that all these are potentially important new directions for philanthropy, although I am on record as worrying that in this process we are likely to abandon some essential philanthropic responsibilities, especially that of basic research. This is an example of the manner in which the innovative philanthropic strategies of the 1990s and the early twenty-first century are making an impact on larger and older foundations. The message is that form does not determine function in the foundation world.

Another of the underlying changes in the contemporary field of philanthropy is in

the sources of their wealth. The recent emergence of enormous concentrations of wealth in the hands of young people (well, younger than Rockefeller and Carnegie), largely in the fields of technology and finance –truly *nouveau riche*– has led to very different notions of what private wealth and power mean and how they should be devoted to the public good. The change is also one simply of *scale*. We have never had so many extraordinarily large philanthropic foundations. Ten years ago the Foundation Center identified five mega-foundations (I define a mega-foundation as one that has net assets of at least one billion dollars). As of mid-2015 there were 84 mega-foundations listed.<sup>vii</sup> 4 of these had net assets of more than \$10 billion, 12 had net assets of more than \$5 billion, and 23 had net assets of more than \$3 billion. These mega-foundations are different than the historically large legacy foundations not only because of their financial scale. It is particularly important that they nearly all have living donors. Many of them have also adopted the ideas of “strategic” philanthropy, organizing their investments into relatively narrow programs and seeking relatively short term, measurable impact. Taken as a whole, then, the emerging mega-foundation sector has created an internal revolution in the field of philanthropy.<sup>viii</sup>

A necessary result of the emergence of mega-foundations is a trend to what might be called “wholesale” philanthropy – moving toward the upper end of the scale of units of grant-making. When their annual payout is in the hundreds of millions of dollars, foundations can only meet their payout requirements by making very large average grants (we’re not talking about \$35,000 to Karl and Katz at this point). On the one hand, it would require enormous staffs to process a much larger number of smaller grants and, on the other, the current scale of mega-foundation grant-making is largely the result of the highly proactive grant-making approach typical of the new mega-foundations. But what matters most in the new philanthropy is the donors themselves. Donors like Bill and Melinda Gates or Eli Broad have been very involved in the conceptualization and sometimes the direction of their philanthropies, and their active involvement in their philanthropy matters.

Mega-philanthropy thus makes a huge difference in the way the sector functions, especially in its attempts leverage its funds and to directly influence public policy. This

raises the question: “Is there such a thing as a foundation that’s too big to fail?” Should we seriously consider establishing a new legal regime for such huge philanthropic entities? Should the new philanthropy worry us in the way that it troubled Americans in the Progressive Era? I think that this contemporary moment of enormous concentrations of wealth should make clear to us that too close an association between private power, public policy, and philanthropy is a threat to the proper functioning of our democracy. Hopefully, this is the wake-up call we have needed to reignite some the early twentieth century critiques of foundations, and finally to effect reforms to regulate them.

### 3. What Can and Should Be Done To Reform Philanthropy?

I believe that we need a functional definition of philanthropy. Not a better definition, for I don’t think we have a workable definition at all. Consider the Treasury Regulation 1.501(c)(3)-1 of 1959:

Charitable defined. – The term “charitable” is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of “charity” as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged [yadada, yadada . . .].<sup>ix</sup>

Lawyers will understand more or less how we have arrived at this pass, and we generally understand how the IRS applies such a vague rule, but it is of little help in either understanding or regulating the institution of philanthropy as it has emerged in the twenty-first century.

It is time to stop relying primarily on the will of donors to describe the parameters of the field. Marion Fremont-Smith has recently concluded that in the United States, “... the laws governing charitable purposes give wide latitude to a donor to choose the objects of his beneficence.”<sup>x</sup> We could consider adopting the British approach and have formal classifications of acceptable public categories for philanthropy. It seems unlikely that will happen, since it would seem too threatening to the golden egg, but perhaps it ought to be on the table. Right now almost any gift that is neither obviously self-serving nor contrary to public policy will probably qualify as charitable. Few Americans seem to be trou-

bled by this situation, but I am, and I think that we ought to confront the problem directly. But I realize that even calling for open discussion of the problem will provoke strenuous opposition from many in the field of philanthropy.

This situation has been exacerbated by the failure of the media to cover philanthropy adequately. If you've read Tocqueville, you'll remember how important he thought the press was to the proper administration of democratic government. But the press has never done a good job in covering philanthropy, and at the moment it is doing a particularly poor job. There are almost no beat reporters on philanthropy. What gets covered concerning philanthropy is primarily the rock stars of mega-philanthropy, a trend well represented in Nicholas Kristoff's puff column in the *New York Times* on 19 July 2015, "Bill and Melinda Gates's Pillow Talk."<sup>xi</sup> But the problem is not in the press, but in ourselves. If we believe that our field deserves to be taken seriously by the public, we need to find a way better to describe what it is we strive to do.

I think that there are many possible limitations on the forms of institutional philanthropy that ought to be on the table for discussion: time limitations on foundation lifespan; increases in the payout rate; specific standards for the trusteeship; limitations on the minimum and/or the maximum size of foundation assets? All these things have been bruited as possible reforms, and all of them, and many other reform policies, might be considered. But there has been little willingness in the field to entertain seriously proposals for reform. A large part of the problem is that so many of the sectoral trade organizations seem likely to oppose reform. Indeed, it could be argued that one of the most important legacies of the Filer Commission's efforts at philanthropic reform has been the emergence of intra-sectoral organizations whose most important accomplishment may turn out to have been their success in fending off public regulation of the "industry."

Consider the problem of meaningful accountability for philanthropic foundations. Scholarly accounts of the problem normally explain the problem away by reference to double or triple bottom lines, but there has been little effort to define standards of accountability. I remember well the adoption of a code of ethics by the board of Independent Sector some years ago, when I was a member.<sup>xii</sup> How many of us even remember the

document? I can also remember when, a couple of decades ago, there suggestions to require the appointment of public trustees of private philanthropic foundations in the same way that we have public directors of companies. That didn't go anywhere. To be sure, in recent years we have somewhat increased the capacity for enforcement at IRS, but the larger problem is one of norms rather than of enforcement. We are frequently told by major figures in the field that the answer is self-regulation. But is there any reason to think the sector will do better at self-regulation in the twenty-first century than it did in the twentieth century? Personally, I doubt it.

#### 4. Concluding Remarks

To summarize: American foundations were established in the early 1900s without precise definitions and with little governmental oversight. This situation has persisted, and even today, there is not a functionally useful definition for philanthropy. Over the past century, however, Americans have generally come to accept that this state of affairs philanthropies are inherently good and have forgotten the early history of philanthropy and the intense political resistance to the idea that private power should influence public policy. However, the emergence of mega-foundations in the past decade should be a wake-up call to revisit the Progressive Era call for critical examination of philanthropy. For effective reform, though, we need both to tackle the question of how we define philanthropy and to identify and address the many obstacles to reform in contemporary American society.

I argue that mega-philanthropy has created a new reality for the social function of philanthropy. It is easy to grasp the difference that the scale of mega-foundations has made, but it is generally less obvious that the behavior of these new behemoths has made a significant qualitative difference to the role of philanthropy in contemporary society. Much more work needs to be done to clarify the ways in which mega-philanthropy is altering the philanthropic landscape, but I contend that there is a *prima facie* case to be made for the reality of change – if only by acknowledging the ways in which private wealth and power have transformed public policy in the field of elementary and secondary education in this country.<sup>xiii</sup> If this is correct, we owe it to ourselves to revisit the serious objections to what was then perceived as dangerously big philanthropy a century ago.

By and large, most of us would agree the wealthy of this country have used their philanthropic capital well, and have done a lot of good. But our mostly passive acceptance of this assumption has overridden the larger question of whether the golden egg of philanthropy is, from a long-term democratic point of view, really golden at all? Should we still be so convinced that philanthropy is a good thing that we ought not risk disturbing it? That is, should we continue to facilitate the mechanisms that have created the conditions for mega-giving? Is it so clear that the egg is golden? I contend that it is not clear, and that we should ask harder questions about the current situation of philanthropy in the United States.

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<sup>i</sup> Sullivan, Barry, Katz, Stanley N. and Beach, Capt. Paul, [Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777-1893](#) (1985). *Law & History Review*, Vol. 3, p. 51, 1985. Available at SSRN: <http://ssrn.com/abstract=1646053>.

<sup>ii</sup> Marion R. Fremont-Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation*, Harvard University Press, 2004, pp.118-119.

<sup>iii</sup> *Ibid.*, pp.471-472.

<sup>iv</sup> Ellen Condliffe Lagemann, *Private Power for the Public Good*, Wesleyan University Press, 1983.

<sup>v</sup> John Haynes Holmes testimony to Walsh Commission, pp. 7916-7917

<sup>vi</sup> Walsh Commission Report, p.85.

<sup>vii</sup> <http://foundationcenter.org/findfunders/topfunders/top100assets.html>

<sup>viii</sup> This trend is international. A recent study of the ten largest international foundations led by high net worth individuals shows that four have been established outside of the United States.

<http://www.wealthx.com/wp-content/uploads/2015/07/Top-10-Largest-UHNW-Led-Private-Foundations.pdf>

<sup>ix</sup> Treas. Reg. 1.501(c)(3)-1(d)(2) (1959) See also Kenneth Liles and Cynthia Blum, "Development of the Federal Tax Treatment of Charities: A Prelude to the Tax Reform Act of 1969," 39 *Law and Contemporary Problems* (1975), p.21.

<sup>x</sup> Fremont-Smith, *Ibid.*, p. 117.

<sup>xi</sup> [http://www.nytimes.com/2015/07/19/opinion/sunday/nicholas-kristof-bill-and-melinda-gates-pillow-talk.html?rref=collection%2Fcolumn%2Fnicholaskristof&action=click&contentCollection=opinion&region=stream&module=stream\\_unit&contentPlacement=1&pgtype=collection&r=0](http://www.nytimes.com/2015/07/19/opinion/sunday/nicholas-kristof-bill-and-melinda-gates-pillow-talk.html?rref=collection%2Fcolumn%2Fnicholaskristof&action=click&contentCollection=opinion&region=stream&module=stream_unit&contentPlacement=1&pgtype=collection&r=0)

<sup>xii</sup> *Obedience to the Unenforceable: Ethics and the Nation's Voluntary and Philanthropic Community* (Independent Sector, 1991, rev. 2002)

<sup>xiii</sup> See, for example, the *New York Times* article on the current influence of philanthropists on elementary and secondary education policy in New York, 29 July 2015:

[http://www.nytimes.com/2015/07/30/nyregion/groups-that-back-bloombergs-education-agenda-enjoy-success-in-albany.html?\\_r=0](http://www.nytimes.com/2015/07/30/nyregion/groups-that-back-bloombergs-education-agenda-enjoy-success-in-albany.html?_r=0). See also: "The Billionaire Boys' Club," Diane Ravitch, *The Death and Life of the Great American School System*, Basic Books, 2010, pp. 195-222; Joanne Barkan, "Got Dough? How Billionaires Rule Our Schools," *Dissent*, Winter, 2011, pp. <https://www.dissentmagazine.org/article/got-dough-how-billionaires-rule-our-schools>; Stanley N. Katz, "Beware Big Donors," *The Chronicle Review*, *The Chronicle of Higher Education*, 25 March 2012.